

Human Rights

Respect · protect · promote

Guide: Human rights in
decision making
*A guide for Commissioners for
Declarations*

Version 2: March 2020



Queensland
Government

Guide: Human rights in decision making

This short guide is for Commissioners for Declarations (Cdecs). It explains how to think about human rights when you make decisions as part of delivering services to the Queensland community. Making decisions under a human rights framework—in conjunction with existing frameworks—helps decision makers think about the individual’s rights before making a decision that limits their rights. You can find more detailed information about human rights at www.forgov.qld.gov.au/humanrights.

Key messages

- The *Human Rights Act 2019* creates a decision-making framework that protects the human rights of individuals when they interact with the Queensland Government.
- When you provide services to the community as a Cdec, you must consider how the human rights of individuals are affected by your actions or decisions.
- There are no personal charges or fines for Cdecs who make decisions that aren’t compatible with human rights. However, there may be consequences for the people trying to access services provided by Cdecs.

Obligations under the *Human Rights Act 2019*

The *Human Rights Act 2019* (the Act) is a law that applies to anyone doing work for the Queensland Government. Cdecs are **functional public entities**¹ under the Act because they provide services on behalf of government for the community. This means that as a Cdec, you have obligations to consider human rights when you provide services.

Under the Act, you have obligations to:

1. **think about human rights when you make decisions.** This is known as a procedural obligation—it is about the process you follow to make a decision. This means that you have to think about human rights *before* you make a decision that might impact people’s rights. You must consider human rights even if you can’t identify a particular person who will be affected by the act or decision, as long as that impact is foreseeable. It is enough for there to be a potential impact on the human rights of an individual or for a group of people. We have provided some case studies to help you.
2. **act and make decisions in a way that is consistent with human rights law.**² This is known as a substantive obligation—it is about the actual decision or action. This means that your

¹A functional public entity is a type of entity that has obligations under the *Human Rights Act 2019*. See section 9(1)(h) of the Act.

²You can find this in section 58 of the Act.

behaviour—the way you act and the decision you make—has to be compatible with human rights.³ This is particularly relevant if the decision or action limits a person’s human rights.

The human rights roadmap

The Act provides a roadmap for making fair and balanced decisions about limiting human rights (set out in section 13 of the Act). Follow these steps to help you think about human rights and understand whether your decision is compatible with the Act.

Step 1: What human rights are affected?

What human rights are affected by the decision? Include rights that you are protecting, promoting, or limiting. If no human rights are affected, you don’t have to go through the rest of the steps. You can visit the [Queensland Human Rights Commission website](#) or see our guide [Nature and scope of the protected human rights](#) for more information about each right.

Step 2: Will human rights be limited by this decision?

How will your decision limit a human right? To understand this question, it will help to know what the right protects. An action or decision limits a human right if it stops a person from enjoying their rights or changes the way a person enjoys their rights. If you aren’t limiting any human rights, you don’t need to go through the rest of the steps.

Step 3: Does the law let me limit human rights?

There has to be a law or regulation that allows you to limit human rights. If there is no law or regulation that says you can make this decision, you may not be able to limit human rights.

Step 4: Can I show that there is a good reason for the limitation? Can I show that the limitation is fair and reasonable?

If we limit human rights, we have to show that there was a good reason, and that it was fair and reasonable. When your actions or decisions will limit an individual’s human rights, think about these questions to decide if the limitation is fair and for a good reason:

- a) What is the human right trying to protect?
- b) Why do we need to limit the right?
- c) What is the purpose of this action, decision, or policy?
- d) Is there a connection between the limitation and the purpose? I.e. will what I am doing actually achieve what I am trying to do?

³ *Compatible with human rights* are words used throughout the Act that have a special legal meaning. This guide explains that meaning. You can also find the meaning in section 8 of the Act, which also refers to section 13.

- e) Can I achieve the purpose in a less restrictive way? Is there another option available to me?
- f) Is there a fair balance between the reason for limiting the right and the importance of protecting the right?

Step 5: Is the decision consistent with human rights law?

If you can show that your decision limits rights in a way that is fair and reasonable, then your decision **is consistent with human rights law**.

If you can't show that your decision limits rights in a way that is fair and reasonable, then your decision **is not consistent with human rights law**. You will need to go back and see if you can make the decision differently. Is there another way to achieve your purpose?

What happens if I don't think about human rights or make a decision that isn't compatible with human rights?

Acting and making decisions in a way that is not compatible with human rights is unlawful. There are no personal charges or fines for Cdecs who make a decision that isn't compatible with human rights. However, existing disciplinary actions will apply (for example, disciplinary actions that apply for breaches of the *Code of Conduct*). Making a decision that is incompatible with human rights can also have consequences for the people using Cdec services. For example, a court could say that evidence is inadmissible if it is gathered inappropriately.⁴ Your decisions can also affect the human rights of individuals. If someone thinks their human rights have been breached, they can make a complaint under existing complaints processes.

Individuals can also complain to the Queensland Human Rights Commission. They provide an accessible and independent avenue for members of the community to raise human rights concerns and reach a practical resolution. Someone with a human rights complaint can't go to a court or tribunal unless they have another claim (e.g. an anti-discrimination claim). They can attach a human rights complaint to that claim and go to a court or tribunal. There is no compensation available for human rights complaints through any complaints or court process.

You can find more information about human rights in Queensland at www.forgov.qld.gov.au/humanrights or www.qhrc.qld.gov.au.

⁴ See *DPP V Natale (Ruling)* [2018] VSC 339

Case studies

Case study 1: Certifying documents for sex reassignment

Stevie needs to get some documents certified and witnessed. She is applying to note a reassignment of sex in the birth register. When Stevie provides her documents about the sex reassignment, the Cdec refuses to witness her signature on the grounds of conscience and personal religious beliefs. Stevie feels embarrassed and offended. The other people waiting in line see this interaction take place.

Step 1: What human rights could be affected by the decision?

The scenario could engage the following rights:

- recognition and equality before the law—including the right to not be treated differently or have unequal access to services because of religious beliefs or activity, political beliefs or activity, gender identity, sex, or sexuality.
- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private.
- freedom of thought, conscience, religion and belief—a person can believe whatever they choose and show their beliefs in public.
- freedom of expression—a person can have their own opinion and express information and ideas.

Step 2: Are human rights limited?

If the Cdec refuses to witness Stevie's signature because of Stevie's gender or sex, this limits Stevie's right to recognition and equality before the law and their right to privacy and reputation. Gender and sex are characteristics that are protected from discrimination under the *Anti-Discrimination Act 1991*. Equality before the law includes the right to not be discriminated against. By refusing to witness Stevie's signature, the Cdec is discriminating against her based on her gender or sex. Stevie's right to privacy and reputation is also limited by the Cdec disclosing her private information to the other people waiting in line.

Step 3: Is there a law allowing the Cdec to make a decision that might limit human rights?

There are laws in Queensland that give powers to JPs and Cdec's to make decisions and provide services. For example, section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* sets out the powers of Justices of the Peace. They also have powers under sections 24 to 26 of the *Justices Act 1886*. The Cdec can make a decision to witness documents according to their general procedures.

Step 4: Can the Cdec show that there is a good reason for limiting Stevie's rights? Is the limitation reasonable?

For example, think about the right to recognition and equality before the law. This right means that Stevie has the same rights as everyone else in Queensland, and that she should be treated equally under the law and not discriminated against.

The purpose for limiting Stevie's right to recognition and equality is to allow the Cdec to have their right to freedom of thought, conscience, religion and belief, and freedom of expression. However, in this situation the Cdec is acting as an entity providing a service on behalf of government, and not as a private individual. People have a right to access services without discrimination, so in this context

limiting Stevie's rights for the purpose of protecting the Cdec's rights is not a fair limitation. The importance of protecting Stevie's right to recognition and equality outweighs the importance of protecting the Cdec's rights.

Step 5: Is the decision consistent with human rights law?

The decision to limit Stevie's rights by refusing to witness her signature is not compatible with human rights. The Cdec must go back and consider how to make a different decision that is compatible with human rights.

Case study 2: Oaths and affirmations

A Cdec, because of their own religious beliefs, insists that clients must take an oath using a bible, regardless of the client's preference. John wants to take an affirmation, in line with his own beliefs.

Step 1: What human rights could be affected by the decision?

The scenario could engage the following rights:

- recognition and equality before the law—including the right to not be treated differently or have unequal access to services because of religious beliefs or activity, political beliefs or activity, gender identity, sex, or sexuality.
- freedom of thought, conscience, religion and belief—a person can think and believe whatever they choose, and can show their beliefs in private or public, on their own or in a group.
- freedom of expression—a person can have their own opinion and express information and ideas.
- cultural rights—generally—a person can enjoy their culture and follow their religion.
- privacy and reputation—everyone has the right to keep their life, body, family, home, correspondence, and information private.

Step 2: Are human rights limited?

The right to freedom of thought, conscience, religion and belief includes the right for people to think and believe what they want and to demonstrate their beliefs. The right also includes the right to choose not to have or practice any religion or belief. Cultural rights affirm the right of all people to practise and declare their religion. If the Cdec forces John to take an oath, this forces him to practice a belief that is contrary to his own, and limits John's right to freedom of thought, conscience, religion and belief. It could also limit his cultural rights.

Step 3: Is there a law allowing the Cdec to make a decision that might limit human rights?

There are laws in Queensland that give powers to JPs and Cdecs to make decisions and provide services. For example, section 29(1) of the *Justices of the Peace and Commissioners for Declarations Act 1991* sets out the powers of Justices of the Peace. They also have powers under sections 24 to 26 of the *Justices Act 1886*.

Step 4: Can the Cdec show that there is a good reason for limiting John's rights? Is the limitation reasonable?

The purpose for limiting John's rights is to allow the Cdec to have their right to freedom of thought, conscience, religion and belief. However, in this situation the Cdec is acting as an entity providing a service on behalf of government, and not as a private individual. People have a right to access

services without discrimination, so in this context limiting John's rights for the purpose of protecting the Cdec's rights is not a fair limitation. The importance of protecting John's rights outweighs the importance of protecting the Cdec's rights.

Step 5: Is the decision consistent with human rights law?

The decision to limit John's rights by forcing him to take an oath is not compatible with human rights. The Cdec must go back and consider how to make a different decision that is compatible with human rights.

Quick human rights checklist

- Can you identify what human rights are affected by your action or decision?
- Does your action or decision limit human rights?
- Is there a purpose for limiting human rights?
- Will limiting a human right achieve that purpose?
- Is there something less restrictive that you can do?
- Is there a fair balance?